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August 31, 2011

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
443 12th Street, S.W.
Washington, D.C. 20554

Re: NOTICE OF EX PARTE COMMUNICATION
WC Docket No. 10-90 *et al*.

Dear Ms. Dortch:

On August 30, 2011, Benjamin M. Moncrief, Manager, Public Policy for Cellular South, Inc. ("Cellular South"), David A. LaFuria, and the undersigned met with Zac Katz, Chief Counsel and Senior Legal Advisor to Chairman Genachowski, Sharon Gillett, Chief, Wireline Competition Bureau, Carol Mattey, and Amy Bender of the Wireline Competition Bureau, Margaret Wiener and Erik Salovaaja of the Wireless Telecommunications Bureau, and Nandan Joshi and Diane Griffin Holland of the Office of the General Counsel to discuss whether the Commission has jurisdiction to redirect the Title II universal service program to providing funding for the deployment of broadband services provided by unregulated information services providers. The Commission's General Counsel, Austin Schlick, participated in the discussion via telephone.

At the meeting, the staff was reminded that Cellular South had filed comments in the above-referenced Connect America Fund rulemaking that specifically addressed the various theories propounded in the notice of proposed rulemaking under which the Commission could claim authority to provide universal service support to Internet access service and IP-based services that the Commission has classified as "information services." *See Connect America Fund*, 26 FCC Rcd 4554, 4575-82 (2011). In its comments, Cellular South expressed the view that the Commission is without statutory authority to redirect universal service support to information service providers. Cellular South was not alone among the commenters in that regard.

It was also noted at the meeting that AT&T, Verizon and some other "price cap carriers" had claimed that the Commission possessed the statutory authority to implement their so-called "ABC Plan." The staff was advised that Cellular South rebutted that claim in comments that it filed last week.

The staff was informed that Cellular South was prompted to request the meeting by reports that the Commission hopes to act to implement its proposal in October. Cellular South felt that it was imperative that the staff be made aware of the likelihood that the Commission's broadband initiatives will be derailed in court on jurisdictional grounds. If the Commission moves forward with its current proposal to reform universal service, the overriding issue on appeal will concern the Commission's subject matter jurisdiction, or its statutorily delegated power to administer the universal service program.

We presented Cellular South's view that the issue of the Commission's subject matter jurisdiction is obviously one of statutory construction. The staff was informed that, in its comments on the ABC Plan, Cellular South construed the Communications Act of 1934, as amended ("Act"), in a manner consistent with the Supreme Court's current thinking — heavily influenced by Justice Scalia — on two interrelated issues.

With respect to statutory construction, the trend has been for the Supreme Court to place much more emphasis on statutory text and less emphasis on legislative history and other sources "extrinsic" to that text. Very often, statutory text is the ending point as well as the starting point for interpretation. The decisive significance that Justice Scalia attached to the dictionary definition of the word "modify" used in § 203(b)(2) of the Act in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 225-29 (1994) exemplifies the Supreme Court's current approach to statutory construction.

The second trend emanates from the Court's discouragement of what it calls "drive-by jurisdictional rulings" which do not distinguish between true jurisdictional conditions and non-jurisdictional limitations on causes of actions. Again led by Justice Scalia, the Supreme Court has fashioned a bright line test to differentiate between jurisdiction-conferring and non-jurisdictional statutory provisions. Basically, to be a jurisdiction-conferring provision, Congress must clearly speak to a court's adjudicatory power. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010). Thus, to be a jurisdiction-conferring provision of the Act, Congress must clearly speak to the Commission's power to regulate an activity.

The staff was informed that Cellular South saw evidence of both trends in the D.C. Circuit's jurisdictional holding in *Comcast Corp. v. FCC*, 600 F.3d 642 (2010) that the Commission is without authority to regulate the network management practices of Internet access service providers. Disdaining the deferential two-step analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), the *Comcast* Court applied the two-part test of *American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir.

2005) to determine whether the Commission's exercise of its so-called ancillary jurisdiction could be linked to "any express statutory delegation of the authority" found in the Act. In other words, the D.C. Circuit recognized that the Commission's subject matter jurisdiction must be derived from a jurisdiction-conferring provision of the Act.

To illustrate how Cellular South construed the text of the universal service provisions of the Act, the staff was given the attached handout entitled "The Commission's Subject Matter Jurisdiction to Administer the Title II Universal Service Program under the Text of §§ 214(e) and 254." We explained that page 2 of the handout juxtaposes an excerpt from the table of contents for the Telecommunications Act of 1996 ("1996 Act") with a corresponding excerpt of the table of contents of Title II of the Act. It shows that §§ 214(e) and 254 were enacted under Subtitle A ("Telecommunications Services") of the 1996 Act, which added two new parts to Title II ("Subchapter II — Common Carriers"): "Part 1 — Common Carrier Regulation" and "Part II — Development of Competitive Markets." Section 214(e) was included in the new Part I and § 254 was one the eleven sections in the new Part II, all of which address telecommunications carriers or the regulation of telecommunications carriers. The structure and headings of the amended Title II are indicative of Congress's intent to make the universal service program (1) subject to common carrier regulation, and (2) serve as one of the means of opening all telecommunications markets to competition.

Page 2 of the handout compares the universal service eligibility provisions of §§ 214(e)(1) and 254(e). The provisions must be read together because they are *in pari materia*, *see Motion Picture Ass'n of America, Inc. v. FCC,* 309 F.3d 796, 801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning*"),* and insofar as each provision makes reference to the other. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc*., 550 U.S. 45, 59 (2007) (Court construed § 201(b) as "expressly linked to a right of action provided in § 207"). Together, §§ 214(e) and 254(e) make it abundantly and unambiguously clear that only common carriers that have been designated as eligible telecommunications carriers "shall be eligible" to receive universal service support. 47 U.S.C. §§ 214(e)(1) & 254(e).

Pages 4 through 7 of the handout serve to dispel the notion that subsections (b) and/or (c) of § 254 can be interpreted to provide the Commission with jurisdiction to direct universal service support to statutorily ineligible information services providers. Page 4 shows the provisions of subsections (b), (c) and (h) of § 254 that refer to "advanced services," "information services," "special services" "telecommunications services," "advanced telecommunications services," or "advanced information services." It highlights that Congress employed the mandatory "shall" in subsection (b) merely to direct the Joint Board and the Commission to "base *policies* for the preservation and advancement of universal service" on seven enumerated "principles." In contrast, Congress employed the less-than-mandatory "should" in subsections (b)(2), (b)(3), and (b)(6), the three universal service principles that refer to "advanced services," "advanced telecommunications services," or "information services."

Page 4 of the handout also highlights that subsection (c) of § 254 distinguishes between the "telecommunications services" that are supported under subsection (c)(1) and the additional "special services" that the Commission may designate for support under subsection (c)(3) for the purposes of providing support for schools, libraries, and health care providers pursuant to subsection (h). Finally, page 4 includes the portions of subsection (h) that either reference the "definition of universal service under subsection (c)(3)" or describe the "advanced telecommunications services" referred to in subsection (b)(6).

Page 5 isolates the provisions of subsections (b) and (c) of § 254 that are expressly linked to the provisions of subsection (h) that describe the telecommunications services for schools, libraries, and health care providers that can be supported under the universal service program. Page 6 only shows the two provisions of § 254(h) — subsections (h)(2) and (h)(3) — that describe the "advanced telecommunications services" referenced in § 254(b)(6) and the "special services" that the Commission may designate for support under § 254(c)(3).

Finally, page 7 of the handout shows how Cellular South harmonized subsections (h)(2) and (h)(3) in strict accordance with the canon of statutory construction under which courts are "obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As shown at page 7, the following mandate gives effect to all the words of subsections (h)(2) and (h)(3):

> "The Commission *shall* establish competitively neutral rules" defining "the circumstances under which a telecommunications carrier may be required" to provide the "[t]elecommunications services and network capacity" necessary "to connect its network to … public institutional telecommunications users" in order "to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries."

Of course, the term "public institutional telecommunications user" is statutorily defined to mean a school, library, or health care provider. *See* 47 U.S.C. § 254(h)(7)(C). Thus, § 254(h) makes universal service support available to telecommunications carriers to provide the telecommunications services and network capacity to schools, libraries, and health care providers that will allow them to have access to (advanced telecommunications and) information services. That construction of § 254(h) explains and harmonizes the subsection (b) principles that: (1) access to "advanced telecommunications and information services" should be provided nation-wide; (2) consumers nation-wide should have access to "advanced telecommunications and information services" at reasonably comparable rates; and (3) schools, health care providers, and libraries should have the access to the "advanced telecommunications services" as described in § 254(h).

As read by Cellular South, the text of § 254 limits the Commission's authority to provide universal service support to information services only to the extent of supporting telecommunications carriers that provide schools, libraries and health care providers with access to advanced telecommunications *and* information services. During the meeting, Cellular South was asked whether the legislative history supported its construction of § 254. While resort to legislative history is not necessary to discern the meaning of subsections (b)(6), (c)(3), and (h) of § 254, support for Cellular South's reading of those provisions can be found at page 133 of the Conference Report (104-458) that accompanied the 1996 Act:

> Pursuant to new subsection (c)(3), the Commission is authorized to designate a separate definition of universal service applicable only to public institutional telecommunications users. In so doing, the conferees expect the Commission and the Joint Board to take into account the particular needs of hospitals, K-12 schools and libraries.
>
> New subsection (h)(2) requires the Commission to establish rules to enhance the availability of advanced telecommunications and information services to public institutional telecommunications users. For example, the Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet. The Commission also is required to determine under what circumstances a telecommunications carrier may be required to connect public institutional telecommunications users to its network.
>
> New subsection (h)(3) clarifies that telecommunications services and network capacity provided to health care providers, schools and libraries may not be resold or transferred for monetary gain.

Cellular South was also queried as to whether § 706 of the 1996 Act provided the Commission with jurisdiction to direct universal service support to broadband services provided by information service providers. We expressed the view that the text of § 706 cannot be read as a jurisdiction-conferring provision, because it speaks clearly to the Commission's existing jurisdiction rather than to the Commission's power to regulate broadband services provided by information service providers. Indeed, § 706(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local

> telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.

Thus, § 706(a) plainly provides that the Commission must exercise its existing "regulatory jurisdiction over *telecommunications services*" to encourage the deployment of "advanced *telecommunications* capability" using Title II regulatory tools such as "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment." Nothing in § 706(a) can be read to delegate any new authority to the Commission, much less to empower it to provide universal service support to unregulated information service providers.

The staff suggested that the last sentence of § 706(b) constituted a delegation of authority to the Commission to provide universal service support for broadband deployment by non-telecommunications carriers. That particular sentence mandates that the Commission take "immediate action" to accelerate deployment of advanced telecommunications capability "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Not only does that particular mandate confer no new authority on the Commission, but disbursing universal service funds to information service providers would work as a disincentive to private infrastructure investment and would hardly "promote competition in the local *telecommunications* market."

We reminded the staff that the Commission once understood that § 706 did not constitute a jurisdiction-conferring statutory provision. In fact, the Commission found in 1998 that § 706(a) gave it "an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24046 (1998) ("*Advanced Services Order*"). The Commission concluded that, "based on the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that [§] 706 does not constitute an independent grant of authority." *Id*. at 24047.

Finally, the staff directed our attention to the Commission's interpretation of § 706 in *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010). But Cellular South's reading of § 706 and the *Advanced Services Order* is entirely consistent with that of the Commission as expressed in *Preserving the Open Internet*, 25 FCC Rcd at 17969:

> While disavowing a reading of [§] 706(a) that would allow the agency to trump specific mandates of the … Act, the Commission nonetheless affirmed in the *Advanced Services Order* that [§] 706(a) "gives this Commission an affirmative obligation to encourage the deployment of advanced services" using its existing rulemaking, forbearance and adjudicatory powers, and stressed that "this

> obligation has substance." The *Advanced Services Order* is, therefore, consistent with our present understanding that [§] 706(a) authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.

In late 2010, the Commission was in agreement with Cellular South's view that § 706 only authorizes the agency to take actions that are within its subject matter jurisdiction and not inconsistent with other provisions of the Act. Therefore, § 706 cannot be read either to expand the Commission's subject matter jurisdiction or to trump the mandate of §§ 214(e) and 254(e) that only common carriers designated as eligible telecommunications carriers under § 214(e) are eligible to receive universal service support in accordance with § 254. Furthermore, the provision of universal service support to ineligible information service providers is not one of the means listed in § 706(a) to encourage the deployment of advanced telecommunications capabilities. In short, the Commission cannot look to § 706 to authorize the misappropriation of Title II universal service funding to support broadband provided on a *non-common carrier basis* as an information services, when the funds were statutorily-designated for telecommunications services provided on a *common carrier basis*. Neither § 706 nor any other provision of the Act authorizes such a gross violation of §§ 214(e) and 254(e).

This letter is being filed electronically pursuant to § 1.1206(b) of the Commission's rules. Should any questions arise with regard to this matter, please direct them to the undersigned.

Very truly yours,

Russell D. Lukas

cc: Austin Schlick
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